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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE JAIRO GARCIA-GIRALDO,

Petitioner,

07 Civ. 9861 (JGK)

02 Cr. 706 (JGK)

- against -

ORDER

UNITED STATES OF AMERICA,

Respondent.

JOHN G. KOELTL, District Judge:

The Court has received the petitioner's motion to amend his petition. Because the respondent has yet to file an answer to the petition, the petitioner may amend his petition once as a matter of course pursuant to Federal Rule of Civil Procedure 15(a). See, e.g., Warren v. Woods, No. 05 Civ. 8438(CM), 2007 WL 2454114, at *2 (S.D.N.Y. Aug. 24, 2007). The petitioner's motion is therefore **granted**.

The respondent is directed to file its opposition to the amended petition by **July 11, 2008**. The petitioner should submit a reply, if any, by **August 1, 2008**.

SO ORDERED.

Dated: New York, New York
June 10, 2008


John G. Koeltl
United States District Judge

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motion to amend a habeas corpus petition. *See Littlejohn v. Artuz*, 271 F.3d 360, 363 (2d Cir.2001). Pursuant to Fed.R.Civ.P. 15(a)

*2 A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

In the instant case, the Court directed the plaintiff to "amend" his original petition because the petition was missing a page. Therefore, although the Court's refers to this amended petition as petitioner's "First Amended Petition," the Court does not consider this amendment to be a Fed.R.Civ.P. 15(a) amendment. Moreover, since the petitioner withdrew his Second Amended Petition, filed on January 11, 2006, the Court is left with the petitioner's Third Amended Petition, dated January 23, 2006.

When the petitioner moved to amend his petition, on January 23, 2006, the respondent had not yet filed an answer to the petition. Therefore, pursuant to Fed.R.Civ.P. 15(a), the petitioner was free to **amend his petition** as a matter of **course**.^{FN1}

FN1. To the extent the respondent claims that the Third Amended Petition contains unexhausted claims, namely the petitioner's claim of ineffective assistance of counsel, based on his trial counsel's failure to object to (1) the prosecution's use of crime-scene photographs; and (2) Detective Vincent Price's testimony regarding anonymous telephone tips, the Court finds

that these claims are exhausted since they were raised on direct appeal. *See Pro Se Supplemental Brief to the New York State Supreme Court, Appellate Division, First Department, Exhibit 3 to Respondent's Affidavit in Opposition*. The Appellate Division found these claims, among other claims raised in the petitioner's *Pro Se Supplemental Brief*, to be "unpreserved." However, the court found that, were it to review the claims in the petitioner's brief, "[the court] would reject them." *People v. Warren*, 2 A.D.3d 186, 187, 768 N.Y.S.2d 465, 466 (App. Div. 1st Dep't 2003).

In addition to requesting permission to amend his petition and to have the court consider it, the petitioner requested that the Court allow him to file a "supplemental petition," in the future, to add: (1) "another exhausted claim currently before the [New York State] Appellate [Division];" and (2) a claim "before the Bronx County Court in regards to newly discovered evidence of Sholey Juah's false information cases." *See Petitioner's Affirmation in Support of Third Amended Petition*, at 6. The Court has determined to treat the petitioner's request as an application to stay the adjudication of the petition, pending the outcome of the state-court proceedings, and will analyze it accordingly.

A district court has the discretion to stay a petition and hold it in abeyance while the petitioner returns to state court to exhaust previously unexhausted claim(s) only if: (a) "the petitioner had good cause for his failure to exhaust [;]" (b) "his unexhausted claims are potentially meritorious[;]" and (c) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 278, 125 S.Ct. 1528, 1535 (2005).

In the case at bar, the petitioner has not demonstrated good cause exists for his failure to exhaust his unexhausted claims prior to making an application for the instant writ. In addition, he has not identified his unexhausted claims with specificity, so as to permit the Court to determine whether

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those claims are potentially meritorious. Furthermore, although it does not appear that the petitioner has engaged in intentionally dilatory litigation tactics, this factor, when considered with the others, does not militate in favor of staying the adjudication of the petition. Therefore, the Court finds that adjudication of the petition should not be stayed pending the outcome of the pending state-court proceedings.

September 16, 2006 Motion to Amend/Supplement the Petition

*3 While the instant motion was pending before the Court, the petitioner filed a motion requesting leave to supplement his Third Amended Petition, pursuant to Fed.R.Civ.P. 15(d).^{FN2} The Court has reviewed Warren's proposed "Supplemental Petition." It appears to be an amended petition, as opposed to a petition that has been supplemented, as contemplated by Fed.R.Civ.P. 15(d), since the "Supplemental Petition" does not appear to reference "transactions or occurrences or events which have happened since the date" the petitioner filed his petition. *Cf.* Fed.R.Civ.P. 15(a).

FN2. Rule 15(d) of the Federal Rules of Civil Procedure provides

Upon motion of a party the court may ... permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense.

Fed.R.Civ.P. 15(a) informs that, in a circumstance where a party has amended its pleading once, as a matter of course, a party may only amend its pleading "by leave of the court or by written consent of the adverse party." Warren never sought nor received permission from the Court to amend his

Third Amended Petition. Moreover, he does not contend the respondent has consented to his most recent petition amendment. Therefore, the petitioner's application, to "supplement" his Third Amended Petition, is denied.

CONCLUSION

For the reasons set forth above, the petitioner's January 23, 2006 motion to amend his petition is granted. However, to the extent the petitioner has requested that the petition be held in abeyance, pending the outcome of state-court proceedings he has initiated, the request is denied. The petitioner's September 16, 2006 motion to amend his Third Amended Petition (Docket Entry No. 16) is also denied.

SO ORDERED.

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